



NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 13 | Number 1

Article 9

Winter 1988

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Recommended Citation

Elaine M. Whiteford, *Immigration and Naturalization Service v. Cardoza-Fonseca: The Last Word on the Standard of Proof for Asylum Proceedings*, 13 N.C.J. INT'L L. & COM. REG. 171 (1988).

Available at: <http://scholarship.law.unc.edu/ncilj/vol13/iss1/9>

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Immigration and Naturalization Service v. Cardoza-Fonseca: The Last Word on the Standard of Proof for Asylum Proceedings?

The United States has long held herself to be a haven for those fleeing their native countries.¹ Aliens can seek asylum regardless of whether they are located at the U.S. border, in the ports, or anywhere within the nation's territory.² Those present in the United States can request a withholding of deportation³ to their motherland. The political struggle between this altruistic policy and the desire to preserve America's resources for her citizens, however, has led to substantial limitations on the ability of aliens to qualify for exemptions under U.S. immigration laws.⁴

To qualify for asylum or withholding of deportation under current immigration law, an alien must prove he will be persecuted if returned to his native country. Traditionally, the "clear probability" of persecution test was used for *withholding of deportation* claims. The codification of the *asylum* procedure in 1980,⁵ however, provided for the "well-founded fear" test. Division among the circuits regarding the standard applicable to the two separate proceedings resulted.⁶ At the base of the conflict is a general disagreement among courts as to the actual interpretation of the well-founded fear test.

Faced with the judicial inconsistency, the U.S. Supreme Court in *Immigration and Naturalization Service v. Cardoza-Fonseca*⁷ recognized a distinction between the two standards and held that the clear probability standard of proof did not apply to asylum proceedings.⁸ The Court declined to set forth guidelines, though, as to the practi-

¹ See *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1289 (1983).

² 8 U.S.C. § 1158 (1982).

³ 8 U.S.C. § 1253(h) (1982). Both asylum and withholding of deportation were available procedures before 1980. But asylum was uncodified U.S. policy. Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INT'L LEGAL STUD. 91, 109-10; see generally 1 A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 10-11 (1966).

⁴ See *Developments in the Law*, *supra* note 1, at 1289.

⁵ See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

⁶ See *infra* notes 69-70 & 80 and accompanying text.

⁷ 107 S. Ct. 1207 (1987).

⁸ *Id.* at 1222.

cal application of the well-founded fear standard.⁹ This note examines the rationale behind the Court's decision in *Cardoza-Fonseca*, the development of U.S. refugee law, and the possible ramifications of the decision on aliens applying for asylum in the United States.

Luz Marina Cardoza-Fonseca¹⁰ appealed the Board of Immigration Appeals' (BIA) denial of her claim for asylum¹¹ under section 208(a) of the Immigration and Nationality Act.¹² Consistent with its previous decisions,¹³ the U.S. Court of Appeals for the Ninth Circuit reversed the BIA.¹⁴ The court held that the well-founded fear test was the proper legal standard for asylum claims under section 208(a).¹⁵ The U.S. Supreme Court affirmed,¹⁶ upholding its previous conclusion¹⁷ that Immigration and Nationality Act section 243(h) required a "clear probability of persecution"¹⁸ since Congress had not expressly amended the standard of proof when it amended the statute.¹⁹ The "well-founded fear of persecution"²⁰ test, on the other hand, was held to be the proper standard for section 208(a) claims based on Congress' explicit incorporation of the test into the statute.²¹

The Immigration and Naturalization Service (INS) had argued that the standards were identical because a "clear probability of persecution" must be proven in order to demonstrate a "well-founded fear of persecution."²² The Court disagreed. In support of its conclusion, the Court examined the language of the pertinent statutory provisions.²³ It found that the language used by Congress

⁹ *Id.*

¹⁰ Cardoza-Fonseca was a Nicaraguan citizen who entered the United States legally as a nonimmigrant visitor. She became deportable when she extended her authorized stay in the United States. *Cardoza-Fonseca v. U.S. Immigration and Naturalization Service*, 767 F.2d 1448, 1450 (9th Cir. 1985), *aff'd*, 107 S. Ct. 1207 (1987).

¹¹ *Id.* at 1450. The BIA held that Cardoza-Fonseca had not met the clear probability of persecution standard of proof. *Id.*

¹² Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1982)).

¹³ See, e.g., *Argueta v. Immigration and Naturalization Service*, 759 F.2d 1395, 1396-97 (9th Cir. 1985); *Bolanos-Hernandez v. Immigration and Naturalization Service*, 767 F.2d 1277, 1283 (9th Cir. 1985); *McMullen v. Immigration and Naturalization Service*, 658 F.2d 1312, 1319 (9th Cir. 1981).

¹⁴ *Cardoza-Fonseca*, 767 F.2d at 1455.

¹⁵ *Id.* at 1454. The U.S. Court of Appeals remanded the case back to the BIA for a factual determination based on the well-founded fear test. *Id.* at 1455.

¹⁶ The U.S. Supreme Court granted certiorari to resolve the division among the federal appellate courts. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1210 (1987).

¹⁷ E.g., *Immigration and Naturalization Service v. Stevic*, 467 U.S. 407 (1984).

¹⁸ *Cardoza-Fonseca*, 107 S. Ct. at 1212.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1212-13.

²² *Id.* at 1212.

²³ *Id.*

in the two statutes was inherently distinguishable.²⁴ The Court stated that the “‘would be threatened’” language conveyed only an objective element,²⁵ whereas the section 208(a) well-founded fear test relied somewhat on a subjective state of mind.²⁶ The Court denied that the “well-founded” qualification of fear removed the focus on subjectivity.²⁷ It also noted the importance of deriving the meaning of a statute from the language of the statute itself.²⁸

To confirm that the language in the Acts was consistent with the congressional intent, the Court recounted a lengthy historical narrative of the two sections and related legislative history.²⁹ Highlighted in the discussion were the practice under section 203(a)(7) of the pre-1980 Immigration and Nationality Act,³⁰ the purpose of conforming to the United Nations Protocol,³¹ and the congressional action that demonstrated the intent to enact two different standards.³² Significantly, the Court rejected both of the government’s main arguments for equating the two standards. First, the government argued that it was illogical for section 208(a) to give greater benefits than section 243(h) since section 208(a) incorporated an easier test for eligibility.³³ The Court attacked the logic of the argument by pointing out that eligibility for section 208(a) did not guarantee a right to asylum as the Attorney General had discretionary power to deny relief.³⁴

The government’s second contention was that the two standards were identical because the BIA equated them in its administrative

²⁴ *Id.*

²⁵ *Id.* The alien must prove “by objective evidence that it is more likely than not that he or she will be . . . persecuted upon deportation.” *Id.*

²⁶ *Id.* at 1212-13. Theoretically, an alien can have a well-founded fear of persecution while, at the same time, not being able to show that he will definitely be persecuted when returned to his homeland.

²⁷ *Id.* at 1213. The Court referred to a quantitative probability analysis: “One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.” *Id.*

²⁸ *Id.* “We have considered ourselves bound to ‘assume that the legislative purpose is expressed by the ordinary meaning of the words used.’” *Id.* (quoting *Immigration and Naturalization Service v. Phinpathya*, 464 U.S. 183, 189 (1984)).

²⁹ *Id.* at 1214-19.

³⁰ *Id.* at 1214-15.

³¹ *Id.* at 1216-18.

³² *Id.* at 1218-19.

³³ *Id.* at 1219.

³⁴ *Id.* Once eligibility is met, the Attorney General has the discretionary power to grant or deny asylum. *Id.*; see *infra* note 64. Once the more stringent eligibility test is met for section 243(h) claims, however, the alien is absolutely withheld from deportation. *Id.* Hence, the Court’s analysis:

We do not consider it at all anomalous that out of the entire class of “refugees,” those who can show a clear probability of persecution are *entitled* to mandatory suspension of deportation and *eligible* for discretionary asylum, while those who can only show a well-founded fear of persecution are not *entitled* to anything, but are eligible for the discretionary relief of asylum.

Id. (emphasis in original).

constructions.³⁵ Following a previous decision,³⁶ the Court denied deference³⁷ to the BIA on the ground that "Congress did not intend the two standards to be identical."³⁸ While acknowledging respect for administrative determinations, the Court highlighted the ability of the judiciary to strike down administrative constructions contrary to congressional intent.³⁹

A review of the history of refugee law is helpful to understanding the impact of *Cardoza-Fonseca*. The initial U.S. legislation dealing with refugees was the Displaced Persons Act of 1948.⁴⁰ The temporary Act allowed displaced Europeans, who feared persecution in their homeland, to enter the United States if they fled pursuant to race, religion, or political opinion.⁴¹ The Internal Security Act of 1950⁴² provided the first means for an alien within the United States to avoid deportation, but only upon a showing that he would be persecuted if returned to his country of origin.⁴³ Under this provision, the U.S. courts expected the Attorney General to comply with a severe factfinding burden on the alien.⁴⁴ Two years later, Congress incorporated an amended⁴⁵ version of the exemption into the Immigration and Nationality Act.⁴⁶ Section 243(h) of the 1952 Act gave the Attorney General discretionary power to withhold deportation of

³⁵ *Id.* at 1220.

³⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

³⁷ For a good discussion of deference, see Note, *A Framework for Judicial Review of an Agency's Statutory Interpretation*, 1985 DUKE L.J. 469.

³⁸ *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 (1987). Another reason for the Court's denial of deference to the BIA was that the BIA had not consistently equated the standards. *Id.* at 1221 n.30.

³⁹ *Id.* at 1221.

⁴⁰ Pub. L. No. 80-774, 62 Stat. 1009 (codified as amended at 50 U.S.C. app. §§ 1951-1965 (1952), omitted as executed 1982). The provisions of the Act were omitted in the 1964 edition of the U.S. Code after they expired at the end of December 1951. Before 1948, U.S. immigration laws did not specifically address refugees or asylees. See *Review of United States Law*, 1982 MICH. Y.B. INT'L. LEGAL STUD. 541, 543.

⁴¹ Refugee entry could be denied, however, if the requirements of the earlier immigration laws were not met and the national origins quota had been reached. See *Review of United States Law*, *supra* note 40, at 543.

⁴² Pub. L. No. 81-831, 64 Stat. 987, *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

⁴³ *Id.* § 23, 64 Stat. at 1010.

⁴⁴ See, e.g., *Harisiades v. Shaughnessy*, 187 F.2d 137 (2d Cir.), *aff'd on other grounds*, 342 U.S. 580 (1951); *Sang Ryup Park v. Barber*, 107 F. Supp. 605 (N.D. Cal. 1952).

⁴⁵ Congress rewrote the exemption in order to alleviate some of the factfinding burden that the courts had placed on the Attorney General. See T. ALEINIKOFF & D. MARTIN, *IMMIGRATION, PROCESS, AND POLICY* 639 (1985). But cf. Note, *Asylum and Withholding of Deportation under the Refugee Act of 1980: Immigration and Naturalization Service v. Stevic*, 20 TEX. INT'L L.J. 367, 371-72 (1985) (no substantial explanation given in the House and Senate reports for the change from the mandatory provision in the 1950 Act and the discretionary provision in the 1952 Act).

⁴⁶ Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1982)).

an alien who may be "physically persecuted" in his home country.⁴⁷ The standard of proof required by the BIA for section 243(h) claims was a "likelihood"⁴⁸ that the alien would be persecuted if returned to his home country.

In 1965 Congress amended section 243(h) by replacing "physical persecution" with "persecution on account of race, religion, or political opinion."⁴⁹ With this amendment, more aliens fell within the range of eligibility. The discretionary power of the Attorney General remained unaltered. The addition of section 203(a)(7)⁵⁰ to the Immigration and Nationality Act in 1965 allowed the entry of refugees who fled Communist-dominated countries because of a fear of persecution.⁵¹ They were required to establish a "good reason"⁵² to fear persecution.

Demonstrating an effort to conform to international refugee law, the United States acceded to the United Nations Protocol Relating to the Status of Refugees (Protocol)⁵³ in 1968. The Protocol required signatory nations to comply with articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees (Convention).⁵⁴ Most importantly, the Protocol defined a refugee by incorporating the well-founded fear standard.⁵⁵

The legislative history of the accession showed that the Senate

⁴⁷ *Id.* § 243(h), 66 Stat. at 214. Section 243(h) of the 1952 Immigration and Nationality Act provides: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

⁴⁸ See, e.g., *In re Janus & Janek*, 12 I. & N. Dec. 866, 873 (BIA 1968) (court withheld deportation upon a showing of the "likelihood of persecution"); *In re Kojoory*, 12 I. & N. Dec. 215, 220 (BIA 1967) (likelihood of persecution).

⁴⁹ Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 910, 918, *repealed by* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

⁵⁰ *Id.* § 3(a)(7), 79 Stat. at 913.

⁵¹ *Id.* Section 203(a)(7) of the Immigration and Nationality Act provided in pertinent part:

Conditional entries shall next be made available by the Attorney General . . . to aliens who satisfy an Immigration and Naturalization Service officer . . . that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion

⁵² *In re Ugricic*, 14 I. & N. Dec. 384, 385-86 (Dist. Dir. 1972).

⁵³ Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter Protocol].

⁵⁴ July 28, 1951, 189 U.N.T.S. 150 [hereinafter Convention]. Although the United States is a signatory to the Protocol, it is not a signatory to the Convention. *Stevic*, 467 U.S. at 416 n.9.

⁵⁵ Protocol, art. 1.2, 19 U.S.T. at 6225, T.I.A.S. No. 6577, at 2, 606 U.N.T.S. at 267. Article 33.1 barred the return of a refugee to a territory where he "would be persecuted." Convention, 189 U.N.T.S. at 176. Article 34 requested that states "shall as far as possible facilitate the assimilation and naturalization of refugees." Convention, 189 U.N.T.S. at 176.

intended the Protocol to be consistent with existing U.S. law.⁵⁶ BIA practice before 1968, however, used the likelihood of persecution standard for withholding of deportation under section 243(h).⁵⁷ The BIA proposed to resolve this discrepancy in *In re Dunar*.⁵⁸ There, the refugee contended that the well-founded fear standard incorporated in the Protocol was the appropriate standard of proof for withholding his deportation under section 243(h) instead of the likelihood of persecution standard traditionally used by the BIA.⁵⁹ Combining the two standards as if they were one, the BIA held that in order to have a well-founded fear, the likelihood of persecution had to exist.⁶⁰

By enacting the Refugee Act of 1980,⁶¹ Congress attempted for the first time to draw together the scattered existing refugee law.⁶² The Act made three major changes in refugee law. First, using the Protocol's definition, the Act added a definition of refugee to the Immigration and Nationality Act.⁶³ Second, the addition of section 208(a) of the Refugee Act of 1980 provided another form of relief for all aliens— asylum.⁶⁴ Finally, the Act amended section 243(h) of the Immigration and Nationality Act by incorporating the language

⁵⁶ "It is understood that the Protocol would not impinge adversely upon the Federal and State laws of this country." S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. 2. Eleanor McDowell, Office of the Department of State's Legal Adviser, commented as to how the Protocol would be incorporated into U.S. law: "[T]he existing regulations which have to do with deportation would permit the Attorney General sufficient flexibility to enforce the provisions of this convention which are not presently contained in the Immigration and Nationality Act." *Id.* at 8.

⁵⁷ See *supra* note 48.

⁵⁸ 14 I. & N. Dec. 310 (BIA 1973).

⁵⁹ *Id.* at 319.

⁶⁰ *Id.* See also *In re Williams*, 16 I. & N. Dec. 697, 700 (BIA 1979) (alien did not meet "well-founded fear" test because she did not prove "probable persecution").

⁶¹ Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

⁶² See Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1981).

⁶³ Refugee Act of 1980 § 201(a), 8 U.S.C. § 1101(a)(42) (1982). "Refugee" is defined in 8 U.S.C. § 1101(a)(42):

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

⁶⁴ *Id.* § 208(a), 8 U.S.C. § 1158(a). The former limited asylum provision, § 203(a)(7), was repealed by the Refugee Act of 1980. The asylum provision contained in 8 U.S.C. § 1158(a) reads as follows:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

from article 33.1 of the Convention⁶⁵ and by making the withholding of deportation mandatory.⁶⁶ None of the amendments to section 243(h), however, altered the standard of proof applicable to withholding of deportation claims.⁶⁷

Although Congress addressed the standard of proof applicable to asylum proceedings with the well-founded fear language in the definition of refugee,⁶⁸ the standard governing section 243(h) proceedings was not discussed. As a result, federal appeals court decisions were inconsistent on the issue of how to construe and apply the two standards of proof. The U.S. Court of Appeals for the Third Circuit held that the well-founded fear of persecution and clear probability of persecution were equal in *Rejaie v. Immigration and Naturalization Service*.⁶⁹ The BIA also equated the two standards in practice.⁷⁰ The U.S. Supreme Court, however, disagreed with the BIA and the Third Circuit in *Immigration and Naturalization Service v. Stevic*.⁷¹

In *Stevic*, the Court was asked to decide what standard applied to withholding of deportation claims. After examining U.S. practice under sections 243(h) and 203(a)(7) of the Immigration and Nationality Act,⁷² the refugee provisions in the UN Protocol,⁷³ U.S. practice after accession to the Protocol,⁷⁴ and the changes enforced by the Refugee Act of 1980,⁷⁵ the Court recognized that section 243(h) did not refer to section 101(a)(42)(A), which defined refugee with the well-founded fear test.⁷⁶ In fact, it was section 208(a) that referred to section 101(a)(42)(A). The legislative history of the Refugee Act further supported the Court's holding that "the clear probability of

⁶⁵ *Id.* § 203(e), 8 U.S.C. § 1253(h). Section 1253(h) of 8 U.S.C. provides:

The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

⁶⁶ *Id.*

⁶⁷ *Immigration and Naturalization Service v. Stevic*, 467 U.S. 407, 421 (1984).

⁶⁸ "The substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the [Protocol]." S. REP. NO. 256, 96th Cong., 2d Sess. 9, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 141, 149.

⁶⁹ 691 F.2d 139 (1982). The plaintiff was denied asylum when he could not prove a clear probability of persecution. *Id.* at 147. However, the Third Circuit based its decision on dictum from a pre-1980 case. See *Kashani v. Immigration and Naturalization Service*, 547 F.2d 376, 378-79 (7th Cir. 1977).

⁷⁰ See *In re Sibrun*, 18 I. & N. Dec. 354, 358-59 (BIA 1983); *In re Salim*, 18 I. & N. Dec. 311, 314 (BIA 1982); *In re Lam*, 18 I. & N. Dec. 15, 17-18 (BIA 1981); *In re Dunar*, 14 I. & N. Dec. 310, 319 (BIA 1973).

⁷¹ 467 U.S. 407 (1984).

⁷² *Id.* at 415-16.

⁷³ *Id.* at 416.

⁷⁴ *Id.* at 418.

⁷⁵ *Id.* at 412-22.

⁷⁶ *Id.* at 423.

persecution" was the correct standard to apply to section 243(h).⁷⁷ The Court observed that the well-founded fear standard was "more generous"⁷⁸ than the clear probability of persecution standard, but failed to clarify the test for asylum eligibility.⁷⁹

Since the meaning of the well-founded fear test was not addressed by the Supreme Court in *Stevic*, the issue of the appropriate standard for asylum eligibility was still unresolved. The Third Circuit, unlike the other U.S. courts of appeals, continued to equate the two standards in practice.⁸⁰ The BIA also continued to construe the two standards as identical. In *In re Acosta*,⁸¹ the BIA ignored the *Stevic* analysis and relied on its own interpretation of the statutes and legislative history. After meticulously analyzing the well-founded fear test, the BIA held that a distinction between the two standards could not be made. In light of the judicial inconsistency, a firm judicial declaration distinguishing the standards was sorely needed.⁸²

The U.S. Supreme Court's decision in *Cardoza-Fonseca* did not overturn or contradict any of its prior holdings. It did, however, expand upon *Stevic*. Although *Stevic* issued general dictum that the well-founded fear test was "more generous"⁸³ than the clear probability test, it did not define the meaning of "well-founded

⁷⁷ *Id.* at 430.

⁷⁸ *Id.* at 425.

⁷⁹ *Id.* "[T]he well-founded fear standard is more generous than the clear-probability-of-persecution standard because we can identify no basis in the legislative history for applying that standard in § 243(h) proceedings or any legislative intent to alter the pre-existing practice." *Id.*

⁸⁰ See *Sankar v. Immigration and Naturalization Service*, 757 F.2d 532 (3d Cir. 1985) (applied clear probability standard to an asylum proceeding); *Sotto v. Immigration and Naturalization Service*, 748 F.2d 832 (3d Cir. 1984) (upheld *Rejaie*); *Marroquin-Manriquez v. Immigration and Naturalization Service*, 699 F.2d 129 (3d Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984) (upheld BIA's application of the clear probability standard to an asylum proceeding). In *Bolanos-Hernandez v. Immigration and Naturalization Service*, the U.S. Court of Appeals for the Ninth Circuit recognized that the well-founded fear test was less stringent than the clear probability test. 767 F.2d 1277, 1282-83 (9th Cir. 1985); see also *Hernandez-Ortiz v. Immigration and Naturalization Service*, 777 F.2d 509, 514 (9th Cir. 1985); *Garcia-Ramos v. Immigration and Naturalization Service*, 775 F.2d 1370, 1373 (9th Cir. 1985); *Sarvia-Quintanilla v. Immigration and Naturalization Service*, 767 F.2d 1387, 1393-94 (9th Cir. 1985); *Argueta v. Immigration and Naturalization Service*, 759 F.2d 1395, 1396-97 (9th Cir. 1985). In agreement with the Ninth Circuit, the U.S. Court of Appeals for the Sixth Circuit maintained that the "well-founded fear" test applicable to asylum eligibility required less proof than the clear probability test for withholding of deportation. *Youkhanna v. Immigration and Naturalization Service*, 749 F.2d 360, 362 (6th Cir. 1984); see also *Dolores v. Immigration and Naturalization Service*, 772 F.2d 223, 226 (6th Cir. 1985); *Reyes v. Immigration and Naturalization Service*, 693 F.2d 597, 599 (6th Cir. 1982). The U.S. Court of Appeals for the Seventh Circuit held that the two standards were "very similar" but "not identical." *Carvajal-Munoz v. Immigration and Naturalization Service*, 743 F.2d 562, 576 (7th Cir. 1984). The Fourth Circuit declined to render a decision on the issue. *Cruz-Lopez v. Immigration and Naturalization Service*, 802 F.2d 1518, 1522 (4th Cir. 1986).

⁸¹ Interim Dec. No. 2986, at 5-6 (BIA Mar. 1, 1985).

⁸² See *supra* note 16.

⁸³ *Stevic*, 467 U.S. at 425.

fear.”⁸⁴ The Court only determined that the clear probability standard was applicable to section 243(h) claims.⁸⁵ Going a step further, *Cardoza-Fonseca* established that the standard for section 208(a) claims was the well-founded fear test, as distinguished from the clear probability test.⁸⁶

By announcing the applicable test for asylum proceedings, *Cardoza-Fonseca* contradicted the practiced rule of the BIA that well-founded fear and clear probability were identical. Part of the BIA’s rationale for this interpretation was based on the nature of the proof. In *Acosta*, the BIA determined that the qualification of fear as “well-founded” ruled out the subjectivity of the test.⁸⁷ Objective proof of the likelihood of persecution was mandatory for success in meeting the well-founded fear test.⁸⁸ The Court in *Cardoza-Fonseca* dismissed any notion that the qualification of fear as “well-founded” eliminated the subjectivity of the test.⁸⁹ By way of explanation, the Court resorted to a mathematical probability analysis.⁹⁰ But, in *Acosta*, the BIA used qualitative analysis without a statistical framework.⁹¹ The BIA listed the guidelines that supported its conclusion that the two standards are equal.⁹² A statistical probability explanation of the standards is not easy to apply in practice. The Supreme Court’s mathematical analysis was unpersuasive when compared to the BIA’s

⁸⁴ *Id.* at 430.

⁸⁵ *Id.*

⁸⁶ See *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1222 (1987).

⁸⁷ *In re Acosta*, I. & N. Interim Dec. No. 2986, at 18.

⁸⁸ *Id.*

⁸⁹ *Cardoza-Fonseca*, 107 S. Ct. at 1213.

⁹⁰ *Id.* See *supra* note 27.

⁹¹ *In re Acosta*, I. & N. Interim Dec. No. 2986, at 25.

One might conclude that “a well-founded fear of persecution,” which requires a showing that persecution is likely to occur, refers to a standard that is different from “a clear probability of persecution,” which requires a showing that persecution is “more likely than not” to occur. As a practical matter, however, the facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions can be meaningfully made. Our inquiry in these cases, after all, is not quantitative, *i.e.*, we do not examine a variety of statistics to discern to some theoretical degree the likelihood of persecution. Rather our inquiry is qualitative.

Id.

⁹² *Id.*

[W]e examine the alien’s experiences and other external events to determine if they are of a kind that enable us to conclude the alien is likely to become the victim of persecution. In this context, we find *no meaningful distinction between a standard requiring a showing that persecution is likely to occur and a standard requiring a showing that persecution is more likely than not to occur.*

Id. (emphasis added).

The court in *Cardoza-Fonseca* addressed this argument in a footnote and concluded that the BIA had not established or even clearly stated that the two standards were “identical, equivalent, or interchangeable.” 107 S. Ct. at 1221 n.30. As the passage makes obvious, the Supreme Court misinterpreted the BIA decision.

comprehensive guideline of the evidentiary factors used in the determination of eligibility for asylum.

Acosta also recognized the inherent difference between asylum and withholding of deportation. If granted asylum, the alien may become a permanent resident.⁹³ Mere withholding of deportation, however, does not ensure that the alien will be able to remain in the United States. Rather, it only bars the deportation of the alien to the country where he fears persecution.⁹⁴ The *Cardoza-Fonseca* Court failed to address this distinction in discussing the government's argument that the more stringent standard for section 208(a) contradicts the alien's ultimate entitlement.⁹⁵ Instead, the Court based its entire analysis on section 243(h)'s mandatory provision as distinguished from the discretionary provision found in section 208(a).⁹⁶

The Court's apparent refusal to address the BIA's rationale for equating the two standards may result in the BIA's noncompliance with the holding in *Cardoza-Fonseca*. *Acosta* was decided by the BIA less than one year after the U.S. Supreme Court's decision in *Stevic*. The Supreme Court's declaration that the well-founded fear test was "more generous" than the clear probability test did not stop the BIA from using its traditional assumption that the two standards were equivalent. Granted, the opinion of *Cardoza-Fonseca* was more focused on the well-founded fear test than the *Stevic* opinion. However, the Court either ignored or overlooked some of the BIA's articulate reasoning. Since the BIA consistently held the standards were identical, *Cardoza-Fonseca* should have focused more on the underlying rationale of the BIA's practice.⁹⁷

A sound basis for the Court's decision in *Cardoza-Fonseca* was statutory construction. In its analysis, the Court emphasized the linguistic difference between the wording of the tests—the subjective element of "well-founded fear" and the objective element of "clear probability."⁹⁸ After a clear explanation of how the statutory language supported the difference in the standards, the Court launched into a rather lengthy historical narrative. The purpose of the review was to confirm that the statutory interpretation, as it was derived from the language, was compatible with congressional intent.⁹⁹ Nev-

⁹³ *In re Acosta*, I. & N. Interim Dec. No. 2986, at 28.

⁹⁴ *Id.*

⁹⁵ *Cardoza-Fonseca*, 107 S. Ct. at 1219. The Court did, however, recognize the distinction in a footnote. *Id.* at 1211 n.6.

⁹⁶ *Id.* at 1219-20.

⁹⁷ The Supreme Court avoided placing more emphasis on the BIA's interpretation of the standards by arguing that the BIA was not entitled to deference. *Id.* at 1220. *But see* *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1224-25 (1987) (Scalia, J., concurring).

⁹⁸ *Cardoza-Fonseca*, 107 S. Ct. at 1212-13. *See supra* note 27 and text accompanying notes 87-90.

⁹⁹ *Id.* at 1213 n.12.

ertheless, the Court's historical analysis was not flawless.

First, the Court reviewed procedure under the former section 203(a)(7) in order to determine whether Congress intended the section 203(a)(7) standard to be used in asylum proceedings. The "fear of persecution" standard was used for claims under section 203(a)(7).¹⁰⁰ The standard used in informal parole proceedings, however, was similar to that of the withholding of deportation proceedings.¹⁰¹ Legislative history was clear on the point that the Congress did not intend to change the test used for asylum claims.¹⁰² The Court contended that Congress wanted to retain the standard used under section 203(a)(7).¹⁰³ In his dissent, Justice Powell vehemently argued that the legislative history indicated Congress' intent to retain the standard used for informal parole proceedings.¹⁰⁴ Unfortunately, congressional intent on this point was not clear and gave no strength to the Court's contention.

In its review of the United Nations Protocol, the Court compared the provisions of 243(h) and 208(a) with articles 33.1 and 34 of the Convention. It concluded that the "would be threatened" test of 243(h) is also in article 33.1¹⁰⁵ and that section 208(a)'s discretionary component corresponded to article 34's¹⁰⁶ provision for not requiring authorization to all aliens eligible for asylum under 208(a).¹⁰⁷ The Court did not cite an authority as to the effect of article 34. Article 34 does not have the "would be threatened" qualification and in that sense it is more similar to section 208(a); however the language of article 34 does not convey the discretionary element that the Court suggested it had.¹⁰⁸

Finally, the Court attempted to show that Congress recognized a difference between the two standards.¹⁰⁹ The Court relied on the premise that Senate action "indicate[d]" a recognition of the difference and that the enactment of the House Bill "demonstrate[d]" congressional intent to have a less stringent standard for asylum.¹¹⁰

¹⁰⁰ *Id.* at 1214.

¹⁰¹ See 8 C.F.R. § 236.3(a)(2) (1987). In an asylum proceeding, "[t]he applicant has the burden of satisfying the Immigration Judge that he *would be subject to persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion as claimed." *Id.* (emphasis added).

¹⁰² See *supra* note 68.

¹⁰³ *Cardoza-Fonseca*, 107 S. Ct. at 1215.

¹⁰⁴ *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1229 (1987) (Powell, J., dissenting).

¹⁰⁵ Convention, 189 U.N.T.S. at 176.

¹⁰⁶ *Id.*

¹⁰⁷ *Cardoza-Fonseca*, 107 S. Ct. at 1218.

¹⁰⁸ See *supra* note 55 and accompanying text. Incidentally, in its summary of the effect of the distinction between the articles, the Court confused the articles' provisions. It stated that article 33.1 had the discretionary provision and article 34 contained the "would be threatened" provision. *Cardoza-Fonseca*, 107 S. Ct. at 1218.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Clearly, the legislative history never directly addressed the comparison of the two standards. Thus, the Court's reasoning was based solely on inferences.

The Court only weakened the impact of *Cardoza-Fonseca* by including the analysis of legislative history. The statute is clear on its face. If the statutory language is clear, the apparent meaning from the language of the statute itself is effective.¹¹¹ In this case, the legislative history is neither clear nor conclusive as to the congressional intention for the proper standards. Since the Court specifically declined to set forth guidelines for the application of the well-founded fear test, its historical review of asylum and withholding of deportation proceedings was totally unnecessary. The statutory language is clear that two different standards are applicable to the different provisions. The legislative history might have been helpful in understanding the meaning of a well-founded fear, but the Court never analyzed the meaning of the test.

Because the Court did not define a well-founded fear, *Cardoza-Fonseca* may lead to continued uncertainty over the proper application of this test. A conclusion could be drawn from the opinion that the use of a partially subjective basis of determining eligibility for asylum is acceptable.¹¹² Indeed, the Court did not address how much objective proof must be presented in order to make a fear "well-founded." The Court also made a quick reference to its dictum in *Stevic* concerning the meaning of well-founded fear.¹¹³ Nevertheless, the fact that the Court expressly declined to describe the well-founded fear test¹¹⁴ may annul any dicta applicable to an interpretation of that test.

Although the Third Circuit and BIA differed from the other circuits as to the applicable standard, the remaining courts have given different interpretations to the well-founded fear test. The U.S. Courts of Appeals for the Second and Fifth Circuits used an analysis of whether a reasonable person in the alien's circumstances would fear persecution.¹¹⁵ The U.S. Court of Appeals for the Ninth Circuit, on the other hand, used a twofold requirement that "(1) the alien have a subjective fear, and (2) that this fear have enough of a

¹¹¹ *Id.* at 1213.

¹¹² *See id.* at 1212-13.

¹¹³ *Id.* at 1217. "As we pointed out in *Stevic*, a moderate interpretation of the 'well-founded fear' standard would indicate 'that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.'" *Id.* at 1217-18 (quoting *Stevic*, 467 U.S. at 424-25).

¹¹⁴ *Id.* at 1222.

¹¹⁵ *See, e.g.,* *Carcamo-Flores v. Immigration and Naturalization Service*, 805 F.2d 60, 68 (2d Cir. 1986); *Guevara-Flores v. Immigration and Naturalization Service*, 786 F.2d 1242, 1249 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1565 (1987).

basis that it can be considered well-founded.”¹¹⁶ Finally, the U.S. Court of Appeals for the Seventh Circuit required the presentation of either “specific facts” showing that the alien has already been persecuted or a “good reason to fear that [the alien] will be *singled out*.”¹¹⁷ In light of the variety of interpretations, the Supreme Court’s avoidance of interpreting a well-founded fear could result in an inconsistent application of the well-founded fear test. The requirement of proof may be applied in practice by the lower courts and the BIA so as to make the standard more stringent. By not defining a well-founded fear, the Supreme Court left open the possibility that the theoretically distinct tests may be applied in an identical manner.

In its first holding since *Cardoza-Fonseca*, the BIA—recognizing that *Acosta* was overruled—followed the Supreme Court’s declaration that the well-founded fear standard was more generous than the clear probability standard.¹¹⁸ The BIA noted the Supreme Court’s refusal to define the well-founded fear standard and proceeded to review previous federal appellate opinions in an attempt to define the term. After examining the federal cases,¹¹⁹ the agency adopted the application used by the U.S. Courts of Appeals for the Second and Fifth Circuits¹²⁰—“a reasonable person in her circumstances would fear persecution.”¹²¹ But even this approach did not establish firm guidelines for asylum proceedings. Indeed, two recent court of appeals decisions remanded cases back to the BIA on the grounds that the BIA used the well-founded fear language but did not substantively apply the less stringent standard of proof.¹²² In any event, consistent BIA compliance with the holding in *Cardoza-Fonseca* remains to be determined. Moreover, if the courts of appeals establish different approaches to the well-founded fear test, further confusion and inconsistency will once again permeate judicial review of asylum proceedings.

The Supreme Court’s holding in *Cardoza-Fonseca* was favorable to aliens because it supported an easier standard of eligibility for asylum. Consequently, if the less stringent standard is used, more aliens will qualify for asylum. Because of the statute’s discretionary provision, however, the number of aliens granted asylum will not

¹¹⁶ *Cardoza-Fonseca v. U.S. Immigration and Naturalization Service*, 767 F.2d 1448, 1452-53 (9th Cir. 1985).

¹¹⁷ *Carvajal-Munoz v. Immigration and Naturalization Service*, 743 F.2d 562, 574 (7th Cir. 1984)(emphasis in original).

¹¹⁸ *In re Mogharrabi, I. & N. Interim Dec. No. 3028*, at 4 (BIA June 12, 1987).

¹¹⁹ *Id.* at 6-10.

¹²⁰ See *supra* note 115.

¹²¹ *In re Mogharrabi, I. & N. Interim Dec. No. 3028*, at 9.

¹²² See *Castaneda-Hernandez v. Immigration and Naturalization Service*, 826 F.2d 1526, 1530-31 (6th Cir. 1987); *Corado-Rodriguez v. Immigration and Naturalization Service*, 828 F.2d 622, 627-28 (9th Cir. 1987).

necessarily increase. If the Attorney General grants more asylum requests, the increase in the alien population may lead to unhappiness among American citizens. Americans see immigrants as competition for employment and welfare. Hence, the struggle between altruistic policy and the perceived need to preserve scarce resources for U.S. citizens will heighten. In view of these apparently conflicting policies, the BIA may well have had a good policy reason for equating the two standards.

The Court's decision in *Cardoza-Fonseca* settled the debate over the standard applicable to asylum and withholding of deportation claims. Although the Court muddled its analysis with ambiguous legislative history, the statutory language clearly conveyed an intent to have two distinct standards. The big disappointment was the Court's refusal to address the substantive interpretation of a well-founded fear, aside from establishing that it was not equivalent to the clear probability standard. Without a more explicit explanation of the well-founded fear standard, judicial application of the standard will likely be inconsistent. Eventually, the Supreme Court will have to address the issue. Regretfully, more aliens will be forced to wade through the current murky interpretation of the standard before a firm judicial declaration is laid down.

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